R.D. # 0015-02
Lyndhurst, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

DeMASE WAREHOUSE SYSTEMS, INC.[1]
Employer

and **CASE 22-RC-12265**

TEAMSTERS LOCAL 641,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO[2]
Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner filed a petition, amended at the hearing, under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of all full-time and regular part-time drivers, mechanics and warehouse employees employed by the Employer. The Employer, while not opposing the appropriateness of the unit, asserts that two individuals, Catalino Maysonett and Juan Diaz, are not employees of the Employer, but rather are independent contractors not covered by the Act and, therefore, should be excluded from the unit. The Petitioner asserts that Maysonett and Diaz are employees within the meaning of the Act.

I find, for the reasons described below, that Maysonett and Diaz are employees within the meaning of the Act and should be included in the unit.

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[1] The name of the Employer appears as amended at the hearing.
[2] The name of the Petitioner appears as amended at the hearing.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding,[3] I find:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[4]

3. The labor organization involved claims to represent certain employees of the Employer.[5]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:[6]

> **All full-time and regular part-time drivers, owner-operators, mechanics and warehouse employees employed by the Employer at its Lyndhurst, New Jersey facility, excluding all office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act, and all other employees.**

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[3] The parties waived their right to submit briefs in this matter.

[4] The Employer is engaged in the warehousing and transportation of freight at its Lyndhurst, New Jersey facility, the only facility involved herein. It appears from the record that another entity, DeMase Trucking, Inc., also exists at the Employer's facility employing managers, supervisors, dispatchers and office staff. As the record indicates both entities have an interrelation of operations, common management, centralized control of labor relations and common ownership, I find both entities are in fact a single employer. *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982).

[5] The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

[6] There are approximately 12 employees in the unit.

1. FACTS

A. OWNER-OPERATORS

The Employer's General Manger, Dominick DeSantis, was the only witness who testified at the Hearing. As General Manager, DeSantis supervises the drivers, owner-operators, warehousemen and mechanics. DeSantis, jointly with the Employer's President Frank DeMase, is responsible for other personnel matters such as hiring, firing and settling disputes and other matters.

[1] TERMS AND CONDITIONS OF EMPLOYMENT

DeSantis testified that the owner-operators work about five days per week and generally pick-up one to three loads per day, or five to ten a week. The record was unclear as to how many hours the drivers, owner-operators, warehousemen and mechanics work, but DeSantis stated that the drivers[7] come in at 4:00 a.m. and generally leave between 9:00 p.m. and 10:00 p.m.

The record revealed that drivers receive between $15.50 and $18.00 per hour and that owner-operators receive compensation based on a per load basis at $145.00 per load. A load was defined as a container pick-up at either Port Elizabeth or Port Newark that was returned to the Employer's facility and off-loaded. There was no testimony as to how long a pick-up of a load would take. DeSantis testified that compensation per hour verses per load is the distinction between drivers and owner-operators. This distinction was blurred as DeSantis later testified that over the road drivers are compensated by the mile, establishing yet a third mode of compensation.

[7] The record is unclear as to whether DeSantis was referring to the owner-operators when he stated drivers. In later testimony DeSantis did state the owner-operators probably start at 6:00 a.m. and the drivers can start "any time" between midnight, 2:00 a.m., 4:00 a.m. and 6:00 a.m.

DeSantis testified that the Employer offers medical benefits to its drivers, but not to owner-operators. The same is true for the Employer's 401(k) plan. As for vacations, holidays and sick days, DeSantis testified that the Employer has a policy for each, but it does not apply to owner-operators. However, DeSantis did state that owner-operators do not work on certain holidays because the Employer is closed on those days.

The record revealed that the Employer's drivers have all received an employee handbook, but owner-operators have not. Whether receiving an employee handbook and being subject to its contents are one-in-the-same was unclear from the record. The record further reveals that if an owner-operator refuses a load then either DeSantis or Chris Rebori, the dispatcher, would meet with the owner-operator to discuss the matter. In this regard, if such refusals became a practice then that owner-operator would be released. The record does not describe if this has ever occurred nor is the corresponding treatment of drivers for such conduct described.

[2] LEASES

Each owner-operator is party to a lease agreement with the Employer. DeSantis testified that he knew that the lease agreements existed, but that in the year and one month that he worked for the Employer as its General Manger he never had the occasion to view a lease.[8] There is no evidence that any of the terms contained in the lease agreements are, in fact, adhered to or operative.

The lease agreements contain a clause entitled "Confidential Information and

[8] Despite the Employer's failure to authenticate the lease document, it was entered into evidence.

Non-Solicitation." This clause is essentially a covenant-not-to-compete which has a direct impact on any proprietary interest assertedly possessed by owner-operators. The clause states that owner-operators will have access to the names and addresses of the Employer's customers, contractors and employees and that such information may not, during the term of the lease or for a year after cessation, be used by owner-operators in any way. The clause goes on to state that owner-operators shall not "take away or hire any of the Company's customers, contractors, or employees, either for himself or for any other person." Any violation of the clause may result in the Employer seeking injunctive relief.

[3] OTHER WORK RELATED CONSIDERATIONS

The record disclosed several other considerations which I deem critical in reaching my determination that owner-operators are employees as defined in the Act. These include: 1) tee shirts given to owner-operators; 2) DeMase signs painted on owner-operators' trucks; 3) types of trucks driven by owner-operators; 4) entry to the Employer's yard; 5) routes chosen by owner-operators and; 6) opportunity for other work.

The testimony provided by DeSantis regarding uniforms given to employees was inconsistent. On direct-examination, DeSantis testified that employees were given uniforms, but owner-operators were not. These uniforms were not described. On cross-examination, DeSantis stated that all employees, including owner-operators, were given tee shirts with a DeMase logo to wear. There was no attempt by the Employer to reconcile this conflicting testimony and, therefore, I find that owner-operators, in fact, are provided some sort of uniform, albeit a tee shirt.

DeSantis testified that "DeMase Trucking" is painted on each of the owner-operators' trucks. DeSantis stated that owner-operators were permitted to place magnetic stick-on signs over the painted on "DeMase Trucking" lettering when utilizing their truck for entities other than DeMase. However, there is no evidence that owner-operators work for any other entities.

DeSantis testified that the Employer's drivers drive flatbeds, double drops and vans, whereas owner-operators typically own and drive tractors with attached containers.[9] However, DeSantis also stated that owner-operators sometimes drive flatbed trucks, presumably owned by the Employer. This conflict was not explained in the record.

DeSantis testified that the Employer's facility is often closed when drivers return from their day and, in order to accommodate them, they are given an access code to unlock and enter the gates after hours. The access codes are not given to owner-operators; however, it is undisputed that owner-operators park their trucks overnight in the Employer's yard. This apparent conflict likewise went unexplained.

DeSantis testified that the Employer does not direct owner-operators to take a specific route to and from the Employer's facility. I have taken administrative notice that the distance between the Employer's facility in Lyndhurst, New Jersey and the Ports, where containers are dropped off or picked up, is approximately 15 to 20 miles with limited highway routes available. Further, there is no evidence, in contrast, that drivers are directed in the routes they travel.

[9] These containers are not owned by owner-operators.

Finally, with regard to the opportunity to work for other entities, DeSantis testified that owner-operators could work for any other entity when not working for the Employer. There was no evidence that owner-operators have worked for any other entities.

2. LEGAL ANALYSIS

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." The United States Supreme Court in *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968), observed that Congress did not in the Act define "independent contractor," but intended that in each case the issue should be determined by the application of general agency principles. According to the Court, "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor." Id. at 258. The Court further stated that there is no "shorthand formula" or "magic phrase" associated with the common-law test. Id.

In two recent cases, both involving delivery drivers, the Board reaffirmed that the common law test of agency determines an individual's status as an employee or independent contractor. *Roadway Package System*, 326 NLRB 842 (1998) (finding drivers to be employees) and *Dial-A-Mattress Operating Corp.,* 326 NLRB 884 (1998) (finding drivers to be independent contractors). While acknowledging that the common-law agency test "ultimately assesses the amount or degree of control exercised by an employing entity over an individual," the Board in *Roadway* rejected the proposition that those factors that do not include the concept of "control" are insignificant when compared to those that do. Id at 850.

Under the common law right of control test, the distinction between employees and independent contractors has turned on whether the purported employer controls or has the right to control both the result to be accomplished and the manner and means by which the purported employee brings about that result. *Gold Medal Baking Co.,* 199 NLRB 895, 896 (1972). Among factors considered significant at common law in connection with the "right to control" test in determining whether an employment relationship exists, according to the Board in *Standard Oil Co.,* 230 NLRB 967, 968 (1977), are:

> (1) Whether individuals perform functions that are an essential part of the Company's normal operation or operate an independent business;
> (2) whether they have permanent working arrangement with the Company which will ordinarily continue as long as performance is satisfactory;
> (3) whether they do business in the Company's name with assistance and guidance from the Company's personnel and ordinarily sell only the Company's products;
> (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the Company;
> (5) whether they account to the Company;
> (6) whether particular skills are required for the operations subject to the contract;
> (7) whether they have proprietary interest in the work in which they are engaged; and,
> (8) whether they have the opportunity to make decisions which involve risks taken by the independent businessman which may result in profit or loss.

In *United Insurance*, above at 259, the Supreme Court considered the status of insurance agents, noting that they worked primarily away from the company's offices and fixed their own hours of work and workdays. The Supreme Court identified "the decisive factors" in its determination that insurance agents were employees as follows:

> [T]he agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the "Agent's Commission plan" that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.

In *Roadway,* the Board found that many of the characteristics of the employment relationship identified as decisive in *United Insurance* applied to the relationship between the employer and the alleged drivers in *Roadway*, and thus supported the finding that the drivers were employees. The Board observed in *Roadway,* above at 851:

> [T]he drivers here do not operate independent businesses, but perform functions that are an essential part of one company's normal operations; they need not have any prior training or experience, but receive training from the company; they do business in the company's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company's business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss. All of these factors weigh heavily in favor of employee status.

The determination of whether an employee is an independent contractor is quite fact-intensive. *United Insurance,* above at 258. In *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982), the Board elaborated:

> Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.

The party seeking independent contractor status has the burden of proving such status. *BKN, Inc.,* 333 NLRB No. 14 (2001). In applying the facts of the instant matter to the tests set forth in *United Insurance*, *Roadway* and *Standard* Oil, I am mindful that the burden of proof is on the Employer to show why owner-operators here should be excluded from coverage of the Act. Applying the tests, examining all of the incidents of the relationship between the Employer and the owner-operators, I find that the factors weigh more strongly in favor of employee status for the Employer's owner-operators. The owner-operators here have much in common with the workers found to be employees in *United Insurance* and *Roadway*, and exhibit characteristics found to evidence employee status listed in *Standard Oil*.[10]

In view of the Board cases analyzed above, I find that the schedule that the owner-operators work is similar to that of the drivers. More often than not the owner-operators work five days per week and have contact with the drivers sometimes on a daily basis when they drop their trucks off at the Employer's facility at the end of their

[10] Owner-operator is not synonymous with independent contractor. *Slay Transportation Company, Inc.*, 331 NLRB 1292 (2000).

workday. Owner-operators also have occasion to meet up with other drivers on Fridays, which is the Employer's payday. The schedules of the owner-operators and the interaction they have with the drivers are more indicative of an employer-employee relationship than that of an independent contractor.

Further, DeSantis testified about an employee handbook that all drivers received, but not owner-operators. However, the record was unclear whether the owner-operators are subject to the provisions of the employee handbook. In this regard, it appears that owner-operators who refuse work are initially spoken to. Ultimately, if an owner-operator continues to refuse work, the Employer replaces that owner-operator. The record is silent as to what corresponding procedures are applicable to drivers who refuse assignments. In any event, the process described by DeSantis appears to be consistent with an employer-employee relationship and, absent further explanation, I so find.

I further find that other work-related factors are indicative of employee status. For instance, all drivers, including owner-operators, are given tee shirts with the "DeMase" logo on them to wear while driving for the Employer, thereby holding themselves out to the public as employees of the Employer. DeSantis testified that owner-operators park their trucks in the Employer's lot overnight.[11] DeSantis testified that drivers drive flatbeds, double drops and vans, whereas owner-operators typically drive trucks with containers attached. However, DeSantis testified that owner-operators sometimes drive flatbed trucks owned by the Employer.

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[11] Presumably drivers park the Employer's trucks there as well.

The record is unclear whether owner-operators operate as independent businesses. There was testimony that owner-operators are permitted to work for other entities when not working for the Employer, but the Employer presented no evidence that owner-operators actually operate independent businesses or work for other entities. See, *United Insurance,* above at 259; *Roadway*, above at 851 I find that owner-operators here are different than the independent contractors in *Dial-A-Mattress* who displayed their own company's name, address and DOT number on their trucks. In this connection, DeSantis testified that the Employer is required by law to identify its vehicles with a DeMase identification and, as a result, owner-operators' trucks are painted with "DeMase Trucking." I find it significant that the trucks owned by owner-operators do not bear their own name, a factor indicative of employee status.

Much was made at the Hearing of the fact that the owner-operators own their own trucks and are responsible for their maintenance, repairs and insurance. While it is true that truck ownership can suggest independent contractor status where, for example, an entrepreneur with a truck puts it to use in serving his or another business' customers, there is no evidence that this is the case here. It is the Employer's burden to clarify this matter if it intends to rely on it. Due to the Employer's lack of evidence on whether owner-operators operate independent businesses, I cannot so find.

Rather than operate as independent businesses, the owner-operators perform functions that are a regular, essential and integral part of the Employer's business operations. See, *Corporate Express Delivery Systems*, 332 NLRB No. 144 (2000); *United Insurance,* above at 259; *Standard Oil Co.,* above at 968. Indeed, the owner-

operators perform more than an "an essential part" of the Employer's business—they account for one-fourth of the Employer's overall business.

In *Slay Transportation Co., Inc*., above at 1294, the Board discussed the fact that owner-operators not only performed an "essential" part of the Employer's normal operations, but were the very core of its business. The same is true in the instant matter. The core of the Employer's business operation is heavy hauling. Owner-operators perform heavy hauling for the Employer in the same manner as drivers. The instant matter is not a situation as in *Dial-A-Mattress*, where delivery drivers who were found to be independent contractors did not perform work that was at the core of the company's business, which was the marketing and selling of mattresses.

The Employer points out that owner-operators choose their own routes and can take breaks during their trips to and from the Employer's facility. But neither of these is inconsistent with employee status. *Standard Oil Co.,* above at 972 (decisions as to what route to follow "are made every day by deliverymen whose employment status is never questioned and involve little if any independent judgement"). I find that in performing the work here, owner-operators do not display the decision-making authority that characterizes work of independent contractors.

The evidence reflects that owner-operators do not have a substantial proprietary interest beyond their investment in their trucks. There is no evidence that owner-operators negotiate their rates of pay. See, *Corporate Express Delivery Systems*, above at p.1. As indicated above, the record includes lease agreements that were not properly authenticated but contain a clause restricting the ability of owner-operators to realize a proprietary interest. That clause, a typical covenant-not-to-compete, threatens

injunctive relief against an owner-operator found to have utilized the Employer's customer list for his own use or for the use by a business associated with the owner operator. This severely limits the proprietary interest, if any. Further, there is no evidence that the terms of the lease agreements are operative or adhered to.

I find that the extent to which owner-operators function as entrepreneurs is limited as well. Owner-operators cannot maximize their income by significantly altering their routes. *Corporate Express Delivery Systems*, above at p.1. There is no evidence that owner-operators choose a destination because hauling to or from there will increase their income. Id. There is no evidence that income is a factor in deciding to reject a route. Id. I do not find on this record that owner-operators consistently make decisions that involve risk of loss or profit. *Standard Oil Co.,* above at 968.

In sum, I find that the above described factors clearly indicate that owner-operators here are employees rather than independent contractors. In this regard, I find that the Employer failed to meet its burden to show that owner-operators are independent contractors and, therefore, should be excluded form coverage of the Act. Therefore, based on the above and the record as a whole, I find that owner-operators are employees, not independent contractors and, should be included in the unit found appropriate.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending

immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by: **Teamsters Local 641, International Brotherhood of Teamsters, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966)*;* NLRB *v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all

parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, Veterans Administration Building, 20 Washington Place, 5th Floor, Newark, New Jersey 07102, on or before **November 5, 2002**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by **November 12, 2002.**

Signed at Newark, New Jersey this 29th day of October, 2002.

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